

BOARD OF REVIEW DECISION

Title of Publication: kostyaA147.jpg

Other Known Title: Not Stated

Format: Computer Image File Printout

Director/Author: Not Stated

Producer/Publisher: Not Stated

Country of Origin: Not Stated

Language: English

Applicant: Name Suppressed By Court Order

Distributor: Not Applicable

Classification: Objectionable.

Descriptive Note: Not Applicable

Display Conditions: Not Applicable

Date of entry in Register: 30 October 2007

Date of direction to issue a label: Not Applicable

OFLC No: 702701

Excisions: Not Applicable

Reasons for excisions:

Not Applicable

**Summary of reasons
for classification:**

Section 3(1) of the Films, Videos, and Publications Classification Act 1993

The Board considers, pursuant to section 3(1) of the Films, Videos, and Publications Classification Act 1993 (the Act), that the publications pass through the “*gateway*” of sex in that they “*depict or express or otherwise deal with*” matters of sex in such a manner that the unrestricted availability of the publication is likely to be “*injurious to the public good*.”

The images in *A2.JPG*, *A4.JPG*, *A6.JPG*, *A8.JPG*, *A82.JPG*, *A84.JPG*, *A86.JPG* and *A9.JPG* all involve the model holding his penis, and looking directly into the camera. *A86.JPG* is an anal shot. All images pass through the “*gateway*” of sex in that they depict matters of sex in the way each image emphasises the penis or anus and the manner in which the model is posed.

In the images *kostyaA066.jpg*, *kostyaA067.jpg*, and *kostyaA147.jpg*, the model is posed in a way so that the focus of the image is on his genitals, and depict matters of sex in the way each image emphasises the genitals of the model. There is an erect penis in two of the images. The model is posed in a manner which is typical of pornographic images.

With respect to the images *patrik2A081.jpg*, *patrik2A088.jpg*, *patrik2A096.jpg*, *patrik2A120.jpg*, there is an emphasis on the genitals and anus. There is an erection in two of the images. The model is posed in a sexualised manner. All images depict matters of sex.

In respect of *patrik2A148.jpg*, the image is posed with an emphasis on the penis and urination. This image is also depicted in a sexualised way with the way the model looks at the camera. This image depicts matters of sex.

Section 3 (2)

Under section 3(2)(a) of the Act, a publication is deemed to be objectionable if it promotes or supports, or tends to promote or support, the exploitation of children or young persons, or both, for sexual purposes.

The Board has made several decisions in which it refers to the fact that the term “*young person*” has not been defined in the Act. In *Bully* (11 April 2003) and *Holiday Snapshots* (29 July 2004) the issue was addressed. In *Bully* at paragraph 62 it states:

“*It is correct there is no definition of ‘young person’ in the definitions section of the Act. In the Children Young Persons and Their Families Act 1989 a young person is defined as being someone between the age of 14 and 17. It is also correct that the United Nations Convention on the Rights of the Child defines a ‘child’ as someone under the age of 18 years. The Convention deals specifically with the issue of the sexual exploitation of young persons and of course New Zealand legislation should be interpreted in such a way as to ensure that it is complying with this Country’s international legal obligations. It is noted that the Court of Appeal in *Moonen II v Film and Literature Board of Review* (CAQ 238/01) declined to provide a definition of young person. For the purposes of this hearing the Board is prepared to assume that the definition of young person is someone under the age of 18 years.*

“Again for the purposes of this review it will be assumed that ‘a young person’ is under the age of 18 years.”

In the images subject to this application there are three models photographed in differing poses. The person in images *A2.JPG* to *A9.JPG* is post pubescent, but is slim, and slightly muscled, with very little body hair and smooth complexion. The model has a boyish physique. The Board’s opinion is that the model is portrayed to have the physical development of someone between the ages of 13 and 15 years and hence a young person.

Kostya, on the other hand, appears older. He has a more muscular development and his facial features are more mature. The Board was provided with a document purporting to be a copy of Kostya’s passport showing a date of birth of 27 May 1984. There is no evidence available to the Board as to when the images which are before the Board were taken, to assess Kostya’s age at the time of shooting.

The Board finds that the photographs with Kostya are staged, with the stuffed toys for instance, to make him appear young. The website www.teenboytime.com adds to the deliberate impression of trying to create a younger image for Kostya. The Board unanimously finds Kostya to be a young person.

With respect to Patrik, the Board has also been provided with a document purporting to be a copy of his passport with a date of birth of 17 February 1986. Once again there is no indication as to when the images were taken. It is the Board’s view that Patrik is the oldest looking of the three models. The Board notes the development of Patrik’s genitalia including the pubic hair. The website of www.originalboys.com adds to the deliberate attempt to create a younger impression for Patrik.

Without ascribing a particular age to any of the models, the Board’s majority view is that Kostya and Patrik would be perceived to fit within the band between 16 and under 18 years, even though Kostya is staged to look younger. The unnamed person in the eight images starting *A2.JPG* appears to be portrayed as a young person below the 16 to under 18 year band.

As previously noted, the Board has in earlier decisions been prepared to assume the definition of a young person is someone who is under the age of 18 years.

The Board accepts the submission of the OFLC that the correct interpretation of *Moonen v Film & Literature Board of Review (Moonen II)* [2002] 2 NZLR makes the actual age of the models irrelevant as

“the Legislation is concerned with the vulnerability of young people and with the corrosive injury to the public good of depicting persons perceived to be children or young persons as subjects for exploitation.”

The majority of the Board find that the images of the three models are deliberately, or otherwise, portrayed to make them appear to be under 18 years and therefore are young people. The majority therefore finds all three models are depicted as young people. The minority find Patrik is not presented as a young person.

The next issue for the Board is whether these particular images exploit the young person for sexual purposes. It is the corrosive effect of the portrayal of young persons being available for sexual purposes that the legislation is aimed at.

The majority opinion of four of the Board members is that as the models are presented as under the age of 18 years, and photographed in the sexualised manner in which the three models in these images are, there is exploitation of young persons for sexual purposes. The minority view excludes Patrik.

The next issue for the Board is whether these publications “*promote or support or tend to promote or support the exploitation of young persons for sexual purposes.*”

The Board’s decision is that the images *A2.JPG*, *A4.JPG*, *A6.JPG*, *A8.JPG*, *A82.JPG*, *A84.JPG*, *A86.JPG* and *A9.JPG* are intended to portray someone who is reasonably seen as a young person. This is the precise injury to the public good that *Moonen* said section 3(2)(a) was intended to remedy.

In presenting the images in the manner they are, the Board finds they are exploitative of young persons for sexual purposes. The manner in which the images are presented, namely the poses exposing and emphasising the genitalia, do promote or support, or at least tend to promote or support, the exploitation.

In regard to the images *kostyaA066.jpg*, *kostyaA067.jpg*, and *kostyaA147.jpg*, the Board finds that there is a deliberate attempt to present Kostya as being a young person by the use of stuffed toys, and the poses of the model, which accentuate and direct the viewer towards the genitals. For the same reasons given in the images *A2.JPG* to *A9.JPG*, the Board finds these images also exploit the young person for sexual purposes, in that the publications promote or support, or tend to promote or support, that exploitation.

The Board’s opinion is reinforced by the script at the bottom of each of the images, copyright www.teenboystime.com which further adds to the impression that the model Kostya was under the age of 16.

In respect of images *patrik2A081.jpg*, *patrik2A088.jpg*, *patrik2A096.jpg* and *patrik2A120.jpg*, the Board has not reached consensus. The majority of four Board members consider that Patrik is presented as a young person under the age of 18 years. Two of the Board consider that the presentation of Patrik is sufficiently ambiguous that it cannot be said that he is presented as under the age of 18 years, or is promoted as being so.

On the basis of the reasons set out in respect of the Kostya images, the majority of the Board find that the publications *patrik2A081.jpg* to *patrik2A120.jpg* are deemed objectionable in that they promote or support, or tend to promote or support, the exploitation of young persons for sexual purposes.

The minority position is that there is sufficient doubt concerning whether Patrik is presented as under or over the age of 18 years in these publications, and that the images should be treated in a similar manner to other adult explicit material which is legally available in New Zealand.

With respect to the image *patrik2A148.jpg*, the Board accepts the Classification Office submission that this image can reasonably be seen as sexual in spite of urination not being inherently so. The model's pose with hand on hip, his gaze at the camera, and his provocative smirk while naked, lead the Board to the view the image does fulfil the requirements of s 3(2)(a) of the Act.

By a majority of four to two, the Board finds, on the basis of the model being presented as under the age of 18 years and the sexualised pose, that the image comes within s3(2)(a) of the Act.

The minority decision excludes Patrik.

The Bill of Rights

In making its decision in respect to the images before it in this application, the Board has considered the 5 step approach set out in *Moonen I*. The Board has also considered *the Living Word Decision* which states:

“the balancing required by s3 must be infused by due consideration of the application of the Bill of Rights.”

The Board is then required to consider whether the extent of such limitation, if found, can be demonstrably justified in a free and democratic society. The objective of the Act is to provide a classification and censorship system in respect to publications, as set out in the long and short titles of the Act. The way in which the objective is achieved must be reasonable in proportion to the importance of the objective, and interfere as little as possible with the right or freedom affected. The Board has had to balance the value of freedom of expression against the need of society against the contents of the publication.

The Board considers the limitations it has placed on the 16 images are justified on balance, taking into account the intention of the Act under which the Board is required to make its decision. It is the Board's view that its decision can be demonstrably justified in a free and democratic society.